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In The Supreme Court Of The United States
October Term, 1998

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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32 pp

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

ARGUMENT 1

1. DOE's Arguments And The Court Of Appeals' May 5, 1998 Order Are Contrary To The Plain Language And Purpose Of The NWPA 1

2. The Petitioners' Action Has Consistently Sought Enforcement Of The NWPA, And The Court Of Appeals' Failure To Undertake Measures To Require DOE To Perform Its Unconditional Obligation To Take SNF Is An Abdication Of Its Original And Exclusive Jurisdiction Under NWPA §119 4

3. Petitioners Have Standing 5

CONCLUSION 10

INDEX OF AUTHORITIES

CASES

Alaska v United States Dep't of Transp.,
868 F.2d 441 (D.C. Cir. 1989) 7- 8

Alfred L. Snapp & Sons, Inc. v Puerto Rico,
458 U.S. 592 (1982) 6

Beecham v United States,
511 U.S. 368; 114 S. Ct. 1669;
128 L. Ed. 2d 383 (1994) 3

Chiles v Thornburgh,
865 F.2d 1197 (11th Cir. 1989) 6

Indiana Michigan Power Co. v Dep't of Energy,
88 F.3d 1272 (D.C. Cir. 1996) 1-2, 5-6

John Hancock Life Ins. v Harris Bank,
510 U.S. 86 (1993) 3

Lujan v Defenders of Wildlife,
501 U.S. 555 (1992) 8

Massachusetts v Mellon,
262 U.S. 447 (1923) 6

Nevada v Herrington,
777 F.2d 529 (1985) 8

Northern States Power Co. v Dep't of Energy,
128 F.3d 754 (D.C. Cir. 1997) 6

Pacific Gas & Elec. Co. v State Energy Resources Conservation & Dev. Comm'n,
461 U.S. 190 (1983) 7

Washington Utilities and Transp. Comm'n v Fed. Communications Comm'n,
513 F.2d 1142 (9th Cir. 1975),
cert. denied, 423 U.S. 836 (1975) 6-7

STATUTES AND REGULATIONS

Administrative Procedures Act,
5 U.S.C. §706(1) 4

All Writs Act,
28 U.S.C. §1651(a) 4

Declaratory Judgment Act,
28 U.S.C. §2201 4

Federal Power Act,
16 U.S.C. §824(a) 7

Nuclear Waste Policy Act of 1982 ("NWPA"),
42 U.S.C. §§10101 *et seq.* 1-6, 9
§111(b), 42 U.S.C. 10131(b) 3
§119, 42 U.S.C. §10139 4-6
§302(a)(5), 42 U.S.C. §10222(a)(5) 1-3
§302(a)(5)(B), 42 U.S.C. §10222(a)(5)(B) .. 1-4

MISCELLANEOUS

Final Interpretation of Nuclear Waste
Acceptance Issues,
60 Fed. Reg. 21,793 (1995) 6

H.R. Rep. 491, 97th Cong., 2nd Sess., pt. 1, (1982)
p. 28-29, 1982 U.S.C.C.A.N. 3794-3795 3

ARGUMENT

1. DOE's Arguments And The Court Of Appeals' May 5, 1998 Order Are Contrary To The Plain Language And Purpose Of The NWPA.

The U.S. Department of Energy ("DOE"), quoting the court of appeals' May 5, 1998 order, argues that its obligation under the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§10101 *et seq.* ("NWPA") is merely to include in contracts the statutory requirement that DOE begin to accept high level radioactive waste and spent nuclear fuel (collectively "SNF") by January 31, 1998, not that DOE must actually comply with this deadline. DOE Brief, p.12. To the contrary, the plain language of NWPA §302(a)(5), 42 U.S.C. §10222(a)(5), and (B), 42 U.S.C. §10222(a)(5)(B), when read as a whole, contains not one, but two Congressional commands: that DOE begin to accept SNF not later than January 31, 1998, and that this mandate also be placed in a contract.

The statutory command setting the deadline in subsection (B) is unequivocal, as the court of appeals held in its prior, unappealed decision in *Indiana Michigan Power Co. v Dep't of Energy*, 88 F.3d 1272 (D.C. Cir. 1996):

> Congress . . . directed the beginning of the Secretary's duty as "not later than January 31, 1998," without qualification or condition. The only limitation placed on the Secretary's duty under (B) is that that duty is "in

> return for the payment of fees established by this section." The Department's treatment of this statute is not an interpretation but a rewrite. It not only blue-pencils out the phrase "not later than January 31, 1998," but destroys the *quid pro quo* created by Congress.

Pet. 35a-36a. The court of appeals in *Indiana Michigan* thus concluded that:

> Under the plain language of the statute, the utilities anticipated fees "in return for [which] the Secretary" had a commensurate duty. She was to begin disposing of the high level radioactive waste of SNF by a *day certain*.

Pet. App. 36 (emphasis added).

The requirement in NWPA §302(a)(5) that the statutory deadline of January 31, 1998 be included in contracts in no way supports DOE's theory that this deadline can be made conditional upon or qualified by other terms in the contract. The reasonable interpretation is that the deadline was placed in the contract to buttress the statutory deadline and to secure the statutory bargain, i.e., the *quid pro quo*, struck by Congress. The contract reference in NWPA §302(a)(5) cannot reasonably be read to countermand Congress' clear mandate in subsection (B) for a January 31, 1998 deadline or to authorize a major programmic failure of the NWPA. In short, DOE's argument once again blue

pencils out the phrase "not later than January 31, 1998" and destroys the *quid pro quo* created by Congress.

In subsection (B), Congress legislated a schedule which imposes on DOE an unconditional obligation to take SNF by a day certain, January 31, 1998. The NWPA must be read as a whole and NWPA §302(a)(5) cannot be read to the exclusion of subsection (B) or the rest of the act. See, *Beecham v United States*, 511 U.S. 368; 114 S. Ct. 1669; 128 L. Ed. 2d 383, 388 (1994) ("The plain meaning that we seek to discern is the plain meaning of the whole statute, not of isolated sentences"); *John Hancock Life Ins. v Harris Bank*, 510 U.S. 86, 94-95 (1993) ("we examine first the language of the governing statute, guided not by a 'single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy'"). In addition to being contrary to the plain meaning of the Act, DOE's argument also conflicts with the purposes of the NWPA and its legislative history.

Congress meant what it said when it created an unconditional obligation for DOE to begin to accept SNF by January 31, 1998. The deadline established in that subsection (B) was *key* to the success of the federal waste disposal program since federal government inaction was the major failing of the nuclear waste disposal program for thirty years prior to the NWPA's enactment.[1] In the NWPA, Congress told DOE it had

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[1] "The failure of the government to provide a permanent waste disposal facility during more than 30 years of federal nuclear activities is unmitigated." ... "[T]here is a solid consensus on major elements of the federal program, *and on the need for legislation to solidify a program and keep it on track.*" H.R. Rep. 491, 97th Cong.,

16 years to get ready to begin taking the SNF. Now, sixteen years later, the DOE is again attempting to rewrite subsection (B) to nullify the deadline set by Congress. Unless this Court acts, the nation will be deprived of the very certainty that Congress sought to provide in the NWPA when it mandated that the DOE had an unconditional obligation to take SNF beginning not later than January 31, 1998.

2. The Petitioners' Action Has Consistently Sought Enforcement Of The NWPA, And The Court Of Appeals' Failure To Undertake Measures To Require DOE To Perform Its Unconditional Obligation To Take SNF Is An Abdication Of Its Original And Exclusive Jurisdiction Under NWPA §119.

DOE erroneously argues that "DOE's obligation to accept SNF by January 31, 1998, was contractual rather than statutory", that the sole remedy for an alleged breach of contract is a claim for money damages under the Tucker Acts, and that "specific performance is not an available remedy in contract actions against the United States." DOE Brief, 14.

DOE's arguments ignore the critical fact that this litigation never was a contract action or a claim for damages. Rather, Petitioners' action was commenced pursuant to NWPA §119, 42 U.S.C. §10139, and related

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2nd Sess., pt. 1 at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. at 3794-3795 (emphasis added). Additionally, NWPA 111(b), 42 U.S.C. 10131(b), expressly states that among the NWPA's purposes are to establish federal responsibility and a *definite* federal policy. (Emphasis added).

statutes[2] to invoke the court of appeals' "original and exclusive" jurisdiction to obtain remedies to *enforce the statute* and the Court's unequivocal holding in *Indiana Michigan*. The various statutes relied upon by Petitioners clearly gave the court of appeals the duty and power to adopt remedies to further DOE's compliance with the NWPA.

The court of appeals' failure to undertake measures to enforce the January 31, 1998 deadline constitutes an abdication of that court's "original and exclusive jurisdiction" to review and remedy DOE's actions and failures to act under NWPA §119. That Court severely limited its review duties and remedies by: (1) adopting in its May 5 order, the hyper-technical and illogical interpretation that the NWPA required a statutory deadline for accepting SNF but never required performance of this duty, and (2) dismissing Petitioners' broad-based petition in its July 2 order, thereby ignoring its duty and the various remedies (e.g. escrow, special master, filed plan for compliance) sought by Petitioners to remedy DOE's refusal to perform.

3. Petitioners Have Standing.

The DOE's claim that the Petitioners lack standing should be rejected for a number of reasons. First, the Petitioners were full parties in *Indiana Michigan*, in which Petitioners challenged the

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[2]The Petition for Review in the court of appeals invoked jurisdiction under NWPA §119, Administrative Procedures Act, 5 U.S.C. §706(1), the Declaratory Judgment Act, 28 U.S.C. §2201, and the All Writs Act, 28 U.S.C. §1651(a).

lawfulness of the DOE's *Final Interpretation of Nuclear Waste Acceptance Issues*, 60 Fed. Reg. 21,793 (1995).[3] Because DOE failed to undertake any actions consistent with *Indiana Michigan*, Petitioners returned to the court in the consolidated action in *Northern States Power Co. v Dep't of Energy*, 128 F.3d 754 (D.C. Cir. 1997) to enforce the court's mandate.

Second, the Petitioners have standing as *parens patriae*. *Citing Alfred L. Snapp & Sons, Inc. v Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), and *Massachusetts v Mellon*, 262 U.S. 447, 485-486 (1923), DOE argues that a State may not bring a *parens patriae* action against the Federal government. However, DOE overstates the holdings in these cases. As the Eleventh Circuit stated "the *Mellon* Court did 'not go so far as to say that a state may never intervene by suit to protect its citizens against any form of unconstitutional acts of Congress.'" *Chiles v Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989).

The States' ability to bring a *parens patriae* action against a Federal agency was expressly recognized by the Ninth Circuit in *Washington Utilities and Transp. Comm'n v Fed. Communications Comm'n*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975). *Washington Utilities* is particularly relevant since it found a state commission "injured" by a final FCC order that could result in higher telephone rates for state residents. 513 F.2d at 1149. As such, the court

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[3]Furthermore, the NWPA §119 evidences no intent to limit court relief to contract holders or otherwise to curtail Petitioners' standing to contest DOE's action in issuing an administrative determination in a publicly noticed comment proceeding regarding DOE's legal obligations under the NWPA.

reasoned that the state commission was obligated to protect the interests of its telephone users and that an FCC order that would raise rates injured the state by interfering with the agency's ability to meet this obligation. *Id.*

The States, Petitioners here, as in *Washington Utilities*, rely upon a federal statute and seek to vindicate the Congressional will by preventing its violation by the federal agency charged with its enforcement. The States have a statutory duty to establish just and reasonable retail electric rates in their respective jurisdictions. In fact, Congress has prohibited federal regulation of the retail sale of electricity. 16 U.S.C. §824(a). Because the setting of retail electric rates, which includes the scrutinizing of utility costs so as to allow only those costs that are reasonable and prudent, is within the exclusive province of the States (and not the federal government) the States have a *parens patriae* role in protecting the economic interests of its citizens. *Id.*

In *Pacific Gas & Elec. Co. v State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 207 (1983), this Court upheld a California state statute regulating the construction of nuclear plants. Because ratemaking and plant-need concerns were deemed to remain in *state* hands, the Court held that the California statute was *outside* the *federally*-occupied field of nuclear safety regulation. This Court accepted the state's avowed non-safety, *economic* purpose as the rationale for enacting the statute. 461 U.S. at 213-214. Thus, in the area of ratemaking, the States have a cognizable sovereign interest, and the DOE's inaction threatens to

diminish the States' ability to set just and reasonable retail electric rates for its citizens. Similarly, the D.C. Circuit in *Alaska v United States Dep't of Transp.*, 868 F.2d 441, 443 n. 1 (D.C. Cir. 1989), observed that "[t]he precise contours of *parens patriae* standing... are somewhat unclear." That decision concluded, however, that "[i]nasmuch as the States' sovereign interest in law enforcement [w]as sufficient to support standing, [it] need not delve into the issue of *parens patriae* standing."

Third, the States also have standing to bring this action in their proprietary capacity as significant purchasers of nuclear generated energy, since they have incurred "injury in fact" due to DOE's failure to act. *Lujan v Defenders of Wildlife*, 501 U.S. 555, 560 (1992); *Nevada v Herrington*, 777 F.2d 529, 534 (1985). DOE's delay and inaction have exposed the States and their ratepayers to unnecessary, additional charges in rates for nuclear generated energy. Such charges result in higher electric rates based, in part, on utility payments to the Nuclear Waste Fund, increased on-site storage, increased decommissioning costs, and additional charges caused by premature shutdowns of those plants lacking adequate on-site storage. Thus, the economic harm to the States and their ratepayers posed by any delay in DOE's performance is both actual and imminent.

Fourth, the States have a direct economic and safety interest in ensuring that nuclear waste is properly stored and disposed of under the federal program. SNF is presently stored at nuclear plants at 73 locations in over 33 states. If the federal government

fails in its duties to dispose of SNF, and the utility industry financially or legally restructures itself away from its nuclear waste liabilities, the States themselves may be called upon to bear the brunt of the nuclear waste disposal problem.[4] The States are thus entitled to utilize every means available, including this litigation, to seek enforcement of the NWPA.

Finally, DOE's position on standing is based on a plain factual error (*viz.*, that no Petitioners are signatories to the Standard Contract with DOE). Among the Petitioners in this case is the Public Systems Group, which includes the American Public Power Association ("APPA"), the national service organization representing publicly-owned electric utilities throughout the United States. Several members of the APPA *are* signatories to the Standard Contract.[5]

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[4]The States' experience with polluted "brown-field sites" left by other bankrupt industries demonstrates the reality of this risk. In Michigan alone, voters on November 3, 1998 approved a tax-supported $675 million dollar bond proposal to clean up polluted "brown-field" industrial sites left abandoned by defunct industries.

[5]Members of APPA that are signatories to the Standard Contract are: Nebraska Public Power District; Omaha Public Power District; New York Power Authority; Sacramento Municipal Utility District; and Washington Public Power Supply System.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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